JD(SF)-84-03
Sacramento, California

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**SAN FRANCISCO BRANCH OFFICE**
**DIVISION OF JUDGES**

BLT ENTERPRISES OF SACRAMENTO, INC.,
d/b/a SACRAMENTO RECYCLING &
TRANSFER STATION,
The Respondent,

and Case 20-CA-31120-1

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL UNION NO. 150, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO,
The Charging Party.

*Lucile Lannan Rosen, Esq. and*
*Ashok Bokde, Esq.,* San Francisco, California,
for the General Counsel.

*Dennis R. Murphy, Esq., Murphy, Austin,*
*Adams & Schoenfeld,*
Sacramento, California, for the Respondent.

*Edward R. Rogers, Business Representative,*
of Sacramento, California for the Charging Party

## DECISION

### Statement of the Case

**CLIFFORD H. ANDERSON, Administrative Law Judge:** I heard the above-captioned case in trial in Sacramento, California, on August 21, 22, and September 2, 2003, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 20 of the National Labor Relations Board (the Board) on May 28, 2003. The complaint is based on a charge filed by Chauffeurs, Teamsters and Helpers, Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO (the Charging Party or the Union) against BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station (the Respondent) on March 7, 2003, and docketed as Case 20-CA-31120-1.

The complaint, as amended at the hearing, alleges, and the answer denies, inter alia, that the Respondent, since on or about November 2002 and continuing to date, has subcontracted bargaining work to outside contractors without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct. The complaint further alleges the Respondent engaged in this conduct because its employees joined and assisted the Union and engaged in concerted activities and to discourage employees from

engaging in such activities. The complaint alleges, and the answer denies, that the Respondent by this conduct violated Section 8(a)(1), (3), (5) and 8(d) of the National Labor Relations Act (the Act).

## Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact.[1]

## I. Jurisdiction

The Respondent is a California corporation with an office and place of business in Sacramento, California, where it is engaged in the business of processing recyclable materials. During the 12 months prior to issuance of the complaint, the Respondent provided services valued in excess of $50,000 to the City of Sacramento, an entity that meets one of the Board's standards for the assertion of jurisdiction on a direct basis. The Respondent admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. Labor Organization

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Alleged Unfair Labor Practices

### A. Background

The Respondent operates a transfer station and material recovery facility for the City of Sacramento, California. Trash and recyclable materials are received at the facility. Recyclables are sorted and sold. Trash, with the exception of certain organic materials not here relevant, is sent by truck to landfills in California and Nevada.[2]

Materials arriving at the transfer station vary in volume on a daily, weekly and seasonal basis. The various landfills used to dispose of the trash vary significantly in their distance from the transfer station and in their tippage fees, i.e. the amount charged by the landfill to receive a load of trash. Access to landfills in some cases is subject to seasonal road and weather conditions. The Respondent essentially continuously calculates the most cost effective and efficacious landfills to be used given its transportation capacity and staffing available[3] and in the light of the cost of transport and tippage.

Although BLT Enterprises has operated other similar facilities within the state for almost 20 years, the Sacramento recycling and transfer station commenced operations in May 1999. The

---

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] The parties agreed that the issues involved herein are limited to the hauling of trash and do not involve the Respondent's recyclable or organic processing and transportation.

[3] Drivers are regulated by public authorities respecting the numbers of hours in given periods which may be spent driving.

Respondent utilized the services of Waste Transport, a subcontractor, to haul trash from the inception of its operations, although other subcontractors have also engaged in trash haulage for the Respondent in various amounts at all relevant times. This practice of subcontracting of trash haulage is consistent with the Respondent's pattern of operations at its other facilities where the Respondent has used subcontractors to provide essentially all of its trash haulage with the subcontractors operating transport equipment owned and maintained by the Respondent.[4].

## B. Events

### 1. The Respondent's Assumption of Trash Haulage and Employee Selection of the Union

At relevant times until its collapse as described below, Waste Transport employed approximately 40 employees engaged in hauling trash from the Respondent's Sacramento transfer station. Waste Transport failed in September 2001 on short notice. On September 24, 2001, in a hurried decision made under the press of necessity, the Respondent took over the driving operations that it had previously done under subcontract by Waste Transport. The employees of Waste Transport that had hauled the Respondent's trash were hired by Respondent and continued to perform the same work at the same facility, and continued to use the Respondent-owned equipment they had used when employed by Waste Transport.

From the onset of Waste Transport's difficulties in fulfilling its trash haulage subcontract, the Respondent was in negotiations with other sub-contractors to, in effect, resume its trash hauling subcontracting by having a substitute contractor or contractors take over the previously subcontracted work. Mr. Shaun Gunderson, the Respondent's Vice President, testified that there was not sufficient time for the Respondent to finalize and implement a new subcontracting agreement by November 14, 2001, when, as described below, a representation petition respecting the Respondent's employees was filed. Mr. Gunderson testified that at that point the Respondent's efforts to again contract out all its trash hauling to subcontractors was discontinued. The use of other contractors to haul some but not all trash continued. Further, negotiations with contractors continued respecting the subcontracting of additional trash haulage for the Respondent but those negotiations did not include complete replacement bargaining unit drivers.

Certain of the former employees of Waste Transport who were now employed by the Respondent hauling trash and new employees hired to do the work for the Respondent sought union representation. The Union filed a representation petition, on November 14, 2001, in Case 20–RC-17713, seeking to represent the Respondent's truck driving employees. A Board election was held in the case on December 21, 2001, in the following appropriate collective-bargaining unit (the Unit):

> All full-time and regular part-time truck drivers employed by Respondent at its 849 Fruitridge Road, Sacramento, California facility; excluding foremen, office clerical employees, Class B yard driver, sorters, janitors, machine operators, weight masters, rakers, traffic controllers, laborers, maintenance employees, guards, and supervisors as defined in the Act.

[4] The Respondent provided uncontested evidence that California municipalities enforce minority and women owned business requirements in their contracts. The Respondent regularly fulfilled these requirements by subcontracting trash haulage to minority owned subcontractors including Waste Transport.

The Union received a majority of valid votes cast at the election, but the parties filed objections to the conduct of the election. In June 2002, the Respondent recognized the Union. On August 2, 2002, the Board issued a Decision, Order and Certification of Representative certifying the Union as representative of the Respondent's employees in the unit.

### 2. Negotiations Respecting Trash Haulage Subcontracting

The Union in its pre-recognition communications with the Respondent asked the Respondent to undertake no subcontracting of unit work without negotiations with the Union. Negotiations between the parties commenced in August 2002 and continued at least to the time of the hearing. The parties held a score or more bargaining sessions to the time of the hearing without an agreement being reached either on a complete contract or on the subject of trash haulage subcontracting.

In negotiations the Union proposed contract language allowing the Respondent to subcontract bargaining work on a temporary basis "as long as all employees are working". The Respondent proposed subcontracting language, which explicitly reserved to it the right to subcontract trash hauling without limitation. The proposal added that: "If subcontracting is done on a long-term basis, the company will give the Union 10-days notice and will negotiate during that period of time regarding the decision to subcontract and the effects of subcontracting."

During bargaining the Union also sought immediate limitation of current levels of subcontracting and proposed that the Respondent hire additional unit employees rather than increase subcontract trash hauling when unit employees left the bargaining unit. The Respondent consistently insisted that it would retain and exercise an unfettered right to subcontract trash haulage as and when it determined it to be advantageous. The Respondent's position to the Union generally was that subcontracting was simply cheaper than utilizing its own employees for trash haulage. The Union in March 2003 sought information from the Respondent respecting the subcontracting issue and was provided access to the Respondent's relevant records.

### 3. The Respondent's Trash Hauling and Subcontracting

The general nature and volume of the Respondent's trash hauling requirements have not changed significantly during the post recognition period. The volume of trash, while variable on a daily and seasonal basis has been generally constant with historical levels. Locations to which the trash is hauled and the scheduling of trash runs has changed since the Respondent's assumption of trash hauling operations producing a variation in daily staffing requirements and a diminution in the number of drivers needed to haul given amounts of trash. Since the recognition of the Union, the Respondent has utilized its unit employees to haul trash augmented by the subcontracted services of Vito Transport, whose employees operate equipment owned and maintained by the Respondent. This subcontracting has been undertaken on an "as needed basis" as opposed to a fixed quantity or term contract. The Respondent also has a contractual arrangement with a landfill in which it hauls a regular fixed number of loads of trash to the landfill.

The parties disagreed respecting the extent of subcontracting undertaken by the Respondent at relevant periods and the impact of that subcontracting on the bargaining unit complement. The General Counsel notes that contract hauling in the 12-month period of October 2001 through October 2002 averaged under 600 tons per month while such contract hauling for the period November 2002 though April 2003, averaged in excess of 4000 tons per

month, an over 700% increase. The Respondent notes that haulage is not a fair measure of work during the relevant periods because of changes in the manner the material was hauled.

The Respondent's unit employee list provided the Union in December 2001, just before the Board's election, bore 38 names. The Respondent hired six drivers in the period of May through August 2002, and a like number of drivers separated from the Respondent's employ during the same period for no net change in unit size. Thereafter in the period of October 2002 through February 2003, an additional seven unit drivers separated from the Respondent's employ, but no unit drivers were hired. By the end of February 2003, there were unit 29 drivers of whom 3 were on the employment rooster but were in fact on leaves of absence and were not available to work.[5] As of April 23, 2003, there were 27 unit drivers actually working with the 3 u drivers on leaves of absence bringing the Respondent's unit roster to 30.

The Respondent, as of about September 2002, stopped hiring employees for the bargaining unit and, when attrition occurred within the unit thereafter, utilized subcontractors to take up the slack. This fact was the subject of discussions in negotiations in the spring of 2003. The Respondent's employee and Charging Party negotiator, Mr. Alan Howton, testified that in negotiations at that time, the Charging Party's Business Agent Chris Folkman asked the Respondent's negotiators what their intentions were regarding hiring employees to replace the ones that had left the bargaining unit since 2001. Mr. Folkman stated, in Howton's recollection that he "felt that the company should reinstate the positions and hire more employees, you know, bring the unit back to its full capacity, where it was when the vote took place." Howton recalled that the Respondent's response to the Union's request was that "they were against rehiring more employees, that they could do the subcontracting for cheaper and that was what their stance was."

### C. Analysis and Conclusions

The complaint alleges two different violations of the Act respecting the same alleged conduct of the Respondent: one a violation of Section 8(a)(3) of the Act and the other a violation of Section 8(a)(5) of the Act. It is meet to consider the two theories of violation separately.

#### 1. The 8(a)(3) Allegation

The General Counsel's complaint alleges that the Respondent, since November 2002, and continuing to date, has subcontracted bargaining work to outside contractors because the employees of the Respondent joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities.

The Respondent argues that there is no significant evidence of anti-union animus on the part of the Respondent's agents. Further, counsel for the Respondent emphasizes on brief that there is substantial, essentially unrebutted, evidence that the Respondent's practice of trash hauling subcontracting was its long-term custom that had only been interrupted by the business failure of its Sacramento subcontractor. It argues that there is no dispute that the Respondent believed and acted upon the belief that subcontracting trash hauling was significantly more economical than utilizing its own employees to do the work. Further, the Respondent argues it abandoned its efforts to subcontract the great bulk of its trash hauling when the representation

[5] These drivers are eligible for return to employment when circumstances in their lives permit. At relevant times they were in fact unavailable for employment due to health issues or military service.

petition was filed and has not discharged nor laid off any unit employees as a result of its subcontracting of trash hauling. The General Counsel does not address this allegation on brief.

Considering the allegation in light of the arguments of the parties, the testimony of the witnesses, and on the record as a whole, I find there is simply insufficient evidence for the General Counsel to establish a prima face case that the Respondent subcontracted trash hauling done by its represented employees because the employees joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities. Accordingly, I shall dismiss this allegation of the complaint in its entirety.

**2. The 8(a)(5) Allegations**

The General Counsel's complaint alleges that the Respondent, since November 2002, and continuing to date, subcontracted bargaining work to outside contractors without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

**a. Narrowing the Issues**

Section 8(a)(5) of the Act obligates an employer to bargain in good faith with the labor organization that represents its employees. There is no doubt that the Respondent is so obligated with respect to its unit employees and the Charging Party. The duty to bargain encompasses the obligation to bargain about mandatory subjects such as wages, hours, and other terms and conditions of employment. Subcontracting of bargaining unit work is also a mandatory subject of bargaining. *Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203 (1964).

During bargaining, until agreement is reached or an impasse in bargaining occurs – events not present in the instant case, an employer is required maintain the status quo respecting terms and conditions of employment. An employer violates Section 8(a)(5) of the Act when it makes a material and substantial change in a mandatory subject of bargaining in the absence of agreement with the Union or an impasse in bargaining unless it establishes certain defenses to be discussed below. There is no doubt that the parties at all relevant times had not reached an impasse in bargaining. While there is considerable dispute respecting the context and extent of the Respondent's changes in its volume of subcontracting at various periods, there is no dispute that the Respondent significantly increased the amount of its later trash hauling subcontracting from the amount it had undertaken at the time of the election. Based on that comparison as well as the changes in the number of employees working in the Unit at relevant times, I find that in implementing and increasing the amount of unit work subcontracting the Respondent made material and substantial changes in a mandatory subject of bargaining at a time there was no impasse in bargaining.

In *McClatchy Newspapers, Inc d/b/a The Fresno Bee*, 339 NLRB No. 158, slip op. at 1 (August 21, 2003) the Board held:

> The General Counsel establishes a prima facie violation of Section 8(a)(5) of the Act when he shows that the employer made a material and substantial change in a term of employment without negotiating with the Union. E.g. *Taino Paper Company, Inc*., 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. E.g. *Cypress Lawn Cemetery, Assn*., 300 NLRB 609, 628 (1990); *Van Dorn Plastic Machinery Co*., 265 NLRB 864, 865 (1982), enf. denied on other grounds, 736 F.2d 343 (6th Cir. 1984).

Section 8(a)(5) of the Act also requires effects bargaining even in cases where there is no obligation to bargain over the changes in working conditions themselves. "Even where a change resulted from a permissible, preelection or managerial decision concerning the scope of business, the employer is required to bargain over the change as an effect of that decision." *McClatchy Newspapers, Inc.,* d/b/a *The Fresno Bee, id*.

Given this unambiguous case law and the undisputed elements of the instant case discussed above, the General Counsel argues, and the Respondent does not effectively oppose, the proposition that a prima facie violation of Section 8(5) of the Act has been established by the above and the burden is thus on the Respondent to show its unilateral change was in some way privileged. I agree and, further, I find that the heart of the dispute respecting the unilateral change allegation herein is the Respondent's past practice defense as discussed below.

**b. The Arguments of the Parties Respecting the Respondent's Subcontracting Past Practice**

The Respondent argues that the subcontracting under challenge herein is in fact simply a continuation of the Respondent's long-term practices. Counsel for the Respondent notes that the Supreme Court has held that actions consistent with long-standing practice are "mere continuations of the status quo." *Katz v. N.L.R.B*., 369 U.S. 736, 747 (1962). The Respondent emphasizes the unusual circumstances of the instant case. The Respondent notes first the historic multi-facility utilization of subcontractor trash hauling as well as the consistent use of a subcontractor or subcontractors at the Sacramento facility. From that consistent conduct, the Respondent notes the unlikely events that followed: the collapse of the operations of the Respondent's trashing hauling subcontractor, the Respondents consequent emergency assumption of the trash hauling work and the concomitant hire of the collapsed subcontractor's employee complement to do the trash hauling work, quickly followed again by the representation petition and the recognition and bargaining with the Union respecting those employees.

The General Counsel and the Charging Party argue that the pre-organizational practices of the Respondent should be disregarded as irrelevant to an analysis of past practice of trash hauling. Looking only to the period following the filing of the representation petition, they argue, the Respondent has no historical or past practice basis for instituting the increase in subcontracting it did over the objection of the Union and without an impasse in bargaining.

**c. Analysis and Conclusions Respecting The Unilateral Change Allegation**

The concept that an employer must maintain the status quo, or in plainer words, keep things as they are, unless and until agreement with the Union or an impasse in bargaining occurs, while seemingly clear and simple, presents a variety of difficulties and subtleties when applied to various situations. The Board has ruled that when the status quo is maintained, conditions are not simply frozen in place, but rather patterned behavior such as scheduled wage increases and annual bonuses or regular holiday gift giving should continue. Past practices in many cases may continue as part of the status quo. The subtle gradations under which regular or past permissible behavior is separated from impermissible discretionary conduct often present complexities of analysis. The Board has noted that there are no Board cases which state that, just because an employer has a past practice of subcontracting certain work, the employer may unilaterally subcontract as much bargaining work as it chooses. *University of Pittsburg Medical Center*, 325 NLRB 443, 443 (1998).

In *Westinghouse Electric Corporation*, 150 NLRB 1574 (1965), the Board addressed the then-recent *Fibreboard Paper Products Corporation* decision, supra, in the context of an employer's claim that its past practice of subcontracting justified subsequent subcontracting. The Board made it clear that it would not read the new subcontracting rule in *Fibreboard* as a hard and fast rule to be applied mechanically in every situation. Rather the Board held that the broader context of events and circumstances would be considered. The Board enumerated five criteria for examination in determining if the employer could subcontract out unit work without first notifying and bargaining with its unit employee's representative. Subcontracting will be valid if it: (1) is motivated solely by economic considerations, (2) comports with the employer's customary business operations, (3) does not vary significantly in kind and degree from past practice, (4) has no demonstrable adverse impact on employees in the unit, and (5) follows an opportunity for the employee representative to bargain.

As earlier considered in significant part in my analysis of the Section 8(a)(3) allegation, supra, I find that the Respondent's subcontracting at issue herein was motivated solely by economic considerations. I also find, based on the history of the employer's operations as described above, that the type of subcontracting was consistent with the Respondent's customary business operations.

My finding that the Respondent in undertaking the challenged subcontracting was engaging in "customary business operations" considers the Respondent's operations over a longer period than the General Counsel and the Charging Party argue is relevant. This issue has significance to evaluating the third criteria of *Westinghouse* and is worthy of additional discussion here. The Respondent in essence subcontracted all its trash hauling until the cessation of its subcontractors operations. At that point the Respondent, to all intents and purposes, fulfilled its trash hauling requirements by hiring the failed subcontractors employees and continuing the subcontractors operations on its own. At the time it took over the trash hauling operations, it immediately made certain changes in hauling practices and initiated a search for a replacement subcontractor to once again take over all its trash hauling. At that point – within a month or two of the assumption of hauling operations, the representation petition was filed and the Respondent put in abeyance its plans to once again completely subcontract trash hauling. During this abeyance the Union was recognized and bargaining commenced. Over time, however, the Respondent reinitiated contacts with subcontractors and entered into limited agreements with subcontractors for trash hauling described above. As discussed in the Section addressing the Section 8(a)(3) allegations, the Respondent has undertaken a course of conduct in which it seemingly retains enough unit work to keep its own unit employees fully employed, but does not replace unit employees as they leave the Unit. Rather the Respondent has simply replaced departing unit employees by means of a matching increase in subcontracted trash hauling services.

The General Counsel and the Charging Party would use the petition – recognition period to establish the pattern or history of the Respondent's operations. This relatively brief period did not involve significant subcontracting and in all events did not involve the more significant levels of subcontracting that occurred thereafter. Thus for the General Counsel and the Charging Party, the Respondent has not established a legally relevant practice of subcontracting and may not successfully assert past practice as a defense to the subcontracting increase allegation.

The Respondent notes the operations at its other facilities, its essentially total subcontracting of trash hauling until its subcontractor's collapse, and its post collapse negotiations to again subcontract all trash hauling. These factors demonstrate, the Respondent argues, a long and consistent practice of subcontracting interrupted only by the unfortunate

collapse of its sole trash hauling subcontractor, Waste Transport, and thereafter by the organization campaign and subsequent recognition of and bargaining with the Union.

In reaching my conclusion that the Respondent's challenged subcontracting comports with its customary business operations, I favored the Respondent's broader approach and considered what the Respondent has done before the filing of the petition and, indeed, what it has done before the collapse of its trash hauling subcontractor. I did so because I do not believe that the shorter period advanced by the General Counsel fairly reflects the Respondent's actual operations over time. In part I agree with the Respondent that the period of a few months between the September 24, 2001, collapse of the subcontractor and the virtually simultaneous takeover by the Respondent of its trash hauling operations, and the November 14, 2001, petition filing and December 21, 2001 election and subsequent recognition and certification simply is not a representative period respecting which to determine the Respondent's subcontracting practices.

I reach a similar conclusion respecting the period to be used in evaluating the third criterion of *Westinghouse*, that the Respondent's more recent subcontracting does not vary significantly in kind and degree from past practice. Using the General Counsel's period as advocated supra, without more, the subsequent subcontracting of trash hauling by the Respondent did in fact increase significantly. Using the Respondent's period, since the Respondent had previously subcontracted all its trash hauling, the subcontracting under challenge in the complaint was clearly not an increase in either kind or degree. Considering the entire history of the Respondent's Sacramento operations, I find that the Respondent's subcontracting did not vary significantly in kind and degree from its past practice.[6]

The fourth criterion of *Westinghouse* is the question whether or not the subcontracting has had a demonstrable adverse impact on employees in the unit. In the instant case, there was a substantial increase in the amount of trash hauling subcontracted out when comparing the period following the filing of the petition to the fall of 2002 to the period of later months into April 2003. The unit employee complement declined over the relevant period by approximately a quarter. At least a part of the reduced unit size resulted from trash hauling procedure changes instituted by the Respondent, which allowed greater output per unit employee. The Respondent as noted, supra, argues that the period to be used to consider unit impact should include the times when there were no unit employees at all.

The subcontracting, as discussed above, while substantial in its impact on the bargaining unit as a whole, did not have an impact on the hours of work of individual employed unit employees. This is so because the subcontracting seems to have been increased when

---

[6] I make this finding realizing that certain Board cases have disregarded pre-certification practice. Thus, the Board noted in *Amsterdam Printing and Litho Corp*., 223 NLRB 370 (1976) at 372:

> Nor do we find merit in the assertion that these unilateral changes are justified by past practice, as the practices of Respondent prior to the certification of the Union do not relieve it of the obligation to consult with the certified Union about the implementation of these practices as affecting the wages, hours, and other terms and conditions of employment of the unit employees. *Oneita Knitting Mills, Inc*., 205 NLRB 500 (1973).

I find that the thrust of many of these decisions is directed to the employers' obligation to bargain about effects discussed separately below.

unit employees left through normal attrition and in an amount matching the unit employee time lost by the unit employee separations.[7] Thus, while there were fewer employees in the Uni8t and the total unit work declined, individual unit employees did not lose work. As will be discussed in the following section, even if there was no direct impact on individual employed unit employees, a diminution in the size of the unit workforce inevitably reduces the job security of the remaining unit employees and dilutes the bargaining strength of the unit.[8] Therefore in this important sense, the Unit is impacted by attrition that reduces the unit size over time as employees are not replaced.

The fifth and final *Westinghouse* criterion is whether or not the subcontracting in contest followed an opportunity for the employee representative to bargain over subcontracting. There is no doubt that the parties met and bargained at all relevant times and that subcontracting and has been a subject respecting which many conversations have been held and proposals exchanged. It is also true, as set forth above, that from the earliest times of their relationship, the Charging Party has asked that the Respondent to discontinue all subcontracting until a contract was reached and that the Respondent has consistently refused to agree and, has further taken the consistent position in bargaining that it will not relinquish the right to subcontract unit work when and to the extent it determined was appropriate. The complaint does not allege that the Respondent's inflexible retention of its position regarding subcontracting was independently a violation of the Respondent's duty to bargain in good faith in violation of Section 8(a)(5). Finally, as found above, the parties at no time reached impasse in bargaining.

Again the parties view and characterize the facts relevant to the *Westinghouse* analysis differently. The Respondent notes that subcontracting was a major element of bargaining and was regularly discussed. The Respondent notes proposals on subcontracting were exchanged and that it timely supplied all requested information to the Union concerning it. Thus the Respondent argues bargaining was well underway respecting subcontracting when the subcontracting at issue was implemented.

The General Counsel argues that the fact that the parties were bargaining over contractual language concerning subcontracting was only relevant to post-agreement contracting and did not mean that the parties ever bargained over the Respondent's interim or pre-final agreement contracting. The General Counsel relies on the testimony of the Charging party's negotiator Chris Folkman: "We have not had any discussions, nor has the company asked to bargain over the practice of subcontracting while negotiations are ongoing."

I disagree with the General Counsel that there was no bargaining over subcontracting within the meaning of *Westinghouse* criterion five. The Union had asked early on asked the Respondent to freeze and thereafter to discontinue subcontracting. As is discussed above, the Respondent at all times refused to limit its discretion to subcontract without limit both in its contract proposals and in its refusal during bargaining to immediately discontinue contracting

[7] The Respondent argued that it was prudent to subcontract out the work of the several unit employees who were on indefinite leave at relevant times, the better to be able to reemploy them when they sought to return. Such work could have been preserved in the bargaining unit and is subcontracted work irrespective of the motive advanced by the Respondent.

[8] The parties were in bargaining at all relevant times during the events in controversy.

and to hire additional unit employees. While the Union was certainly not successful in obtaining agreement with its requests, I find that the Charging Party had the opportunity to bargain that the fifth criterion describes.[9]

Considering the criteria established by *Westinghouse* as discussed above, and on the basis of the testimony of the witnesses and the record as a whole, I find and conclude on the unusual facts of the case that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally changing unit terms and conditions of employment by subcontracting trash hauling after the employees selected a union to represent them. I reach this conclusion because I find that the Respondent's broader history of handling trash hauling as discussed above and as reflected in the consideration of the *Westinghouse* criteria simply makes a normal unilateral change analysis inappropriate and allows the Respondent's past practices to be considered. Here the evidence supports the Respondent's contention that it would have come to once again subcontract all of its trash hauling by middle to late 2002, but that it did not do so only because of the organization campaign, representation petition, and its subsequent recognition and bargaining with the Union on behalf of its trash hauling employees. The normal analysis applied to employers who have reduced unit work through subcontracting, which limits past employer practices as a defense to a unilateral change, falls to the unusual context of events herein. In the instant case the Respondent had delayed its implementation of its decision to resume subcontracting of all its trash hauling because of the employees' organization and had reduced its rate of subcontracting implementation to preserve sufficient unit work for current unit employees. During bargaining the Respondent, in proposals and positions not challenged by the General Counsel as independent bad-faith bargaining, made it clear it would not relinquish its right to subcontract any or even all the trash hauling unit work and further admitted in its discussions with the Union that it had stopped hiring unit employees and fairly conveyed the impression that it intended to continue that course of conduct.

Given the important historical perspective, along with the fact that bargaining has taken place throughout the relevant periods, I find that the Respondent has established a course of conduct based on its normal business model and in response to the unusual circumstances described that in their totality rise to the level of a sufficient defense against the unilateral change allegation of the complaint. In essence *Westinghouse* teaches that the broader context must be considered in evaluating an employer's subcontracting past practice. In the instant case the unusual history of the Respondent's trash hauling bargaining unit and its history of subcontracting the hauling of its trash justify its increased subcontracting during the bargaining relationship. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint when it subcontracted bargaining work to outside contractors without affording the Union an opportunity to bargain with respect to this conduct. I shall therefore dismiss this element of the complaint.

**c. The Effects Allegation**

The complaint alleges both that the Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting bargaining work to outside contractors without affording the Union an

---

[9] The Respondent's inflexible insistence that it retain the unfettered right to subcontract any or all the trash hauling at will arguably could be challenged as a wrongful attempt to undermine the Union by in effect making the employees worse off with such an agreement than without one. See e.g. *Public Service Corporation of Oklahoma (PSO),* 334 NLRB 487 (2001). But importantly, the complaint does not contain such a bad faith bargaining allegation and the General Counsel did not suggest that such a position was bad faith bargaining.

opportunity to bargain with the Respondent with respect to this conduct *and by not bargaining with respect to the effects of this conduct*. As noted earlier, the Board holds that:

> Even where a change resulted from a permissible, preelection or managerial decision concerning the scope of business, the employer is required to bargain over the change as an effect of that decision. (*McClatchy Newspapers, Inc. d/b/a The Fresno Bee,* 339 NLRB No. 158 (2003).)

I have ruled the Respondent did not violate the Act in subcontracting unit work without reaching agreement with the Union respecting subcontracting or an impasse in bargaining. Did the Respondent herein violate the Act by not bargaining respecting the effects of that subcontracting as alleged?

The Respondent in the face of the representation petition and subsequent election, recognition and certification, initially put off efforts to subcontract all its trash hauling and held subcontracting levels generally constant, hiring new unit employees as turnover occurred and unit employees left its employ. Thereafter, as discussed above, the Respondent's subcontracting markedly increased and the Respondent stopped replacing departing unit employees, so that the size of the Unit slowly decreased. The unit complement, in effect, became a grandfathered body of the Respondent's employees who continued to do a declining amount of unit work. As discussed supra, the work available to individual unit employees was unchanged, but with the reduction in the number of actually working unit employees, the amount and proportion of unit work done by unit employees as opposed to subcontractors declined. The Respondent notes that there was no adverse impact on the bargaining unit. As discussed above, this is not correct however. While no employed unit employee suffered from a direct personal loss of work, the adverse consequences to all employees of a loss of job security[10] and bargaining power for those unit employees and the Union[11] acting on their behalf was significant.

The Respondent also argues that it had discussed subcontracting with the Union and the Union had an ample opportunity to bargain over it. While the Respondent never gave specific details of specific subcontracting agreements nor formally presented its plans for future unit hiring, the Respondent's increased subcontracting and its instituted practice of not hiring replacement unit employees became known to the Union. Thus, if the Respondent did not in any formal sense specifically disclose these management decisions to the Union, it in time confirmed them at least indirectly in bargaining conversations as described above.

The statute however requires employer pre-implementation disclosure and effects bargaining, not general non-specific confirmation of implemented changes. The Board noted in *Oklahoma Fixture Co*. 314 NLRB 958, 961 fn. 7 (1994), aff'd in relevant part 79 F.3d 1030 (10th Cir. 1996), that once the employer has decided to implement a change in unit terms of employment, the employer has a duty to give pre-implementation notice to the union to allow for

---

[10] For example, as an employee moves up the seniority list, he or she has a buffer of newer employees with less seniority, who would be the first to suffer from layoff should adverse working conditions necessitate. A unit that does not grow eliminates any opportunity to become relatively more senior than other unit employees.

[11] The smaller the proportion of work done by unit employees, the less economic power the unit has. The potential effectiveness of any strike, or a threat of a strike, would likely be diminished to the extent that the withholding of unit labor represented only a proportion of the labor doing unit work.

meaningful bargaining. The Board noted that effects bargaining may cover a wide variety of topics, but the Union cannot bargain intelligently about employer decisions and their possible effects on unit employees which are not fully and timely disclosed to it. And, as discussed supra, no impasse was ever reached in bargaining.

Based on the above, the arguments of the parties, the testimony of the witnesses and the record as a whole, I find that the Respondent at all relevant times had an obligation under the Act to disclose and bargain with the Union respecting its subcontracting intentions and the impact of those plans and intentions on the employees in the Unit. I find that because the Respondent did not timely and sufficiently notify the Union of its plans and intentions, the Union was not able to bargain effectively respecting their impact on the Unit. This being so the Respondent's implementation of increased subcontracting and its cessation of hiring replacement unit employees to maintain the unit employee complement was undertaken in violation of Section 8(a)(5) and (1) of the Act as alleged in the complaint.

**Remedy**

Having found that the Respondent violated the Act as set forth above, I shall order that it cease-and-desist there from and take certain affirmative action including the posting of a remedial Board notice designed to effectuate the purposes of the Act. Further the language on the Board notice will conform to the Board's decision in *Ishikawa Gasket America, Inc*., 337 NLRB No. 29 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

As part of the remedy herein, the General Counsel seeks an order that Respondent restore the status quo by rescinding unilateral changes made without affording the Union an opportunity to bargain regarding the effects on the unit of its institution of those changes. That is the traditional remedy for the violations of the Act found and will be directed herein. The order will therefore direct that subcontracting be limited to the June through October 2002 levels unless and until the Respondent reaches an agreement with the Union over the effects of its increases in subcontracting or bargains to impasse over the effects. This order will not specifically address the number of unit employees the Respondent must employ since reduction of permissible subcontracting amounts will increase the need for unit employees as appropriate.[12]

**Conclusions of Law**

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

[12] Since no employee lost his or her employment as a result of the Respondent's wrongful conduct, no make whole order will be directed.

All full-time and regular part-time truck drivers employed by Respondent at its 849 Fruitridge Road, Sacramento, California facility; excluding foremen, office clerical employees, Class B yard driver, sorters, janitors, machine operators, weight masters, rakers, traffic controllers, laborers, maintenance employees, guards, and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by subcontracting bargaining unit work to outside contractors without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not otherwise violate the Act as alleged in the complaint and the complaint allegations not sustained shall be dismissed.

**ORDER**

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[13]

The Respondent, BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling and Transfer Station, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Subcontracting bargaining unit work to outside contractors without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct on the bargaining unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Limit the levels of unit work subcontracted to outside contractors to the levels subcontracted during the period June 2002 through October 2002, and continue such limits on subcontracting unless or until the Respondent reaches an agreement with the Union over the effects of its increases in subcontracting on the bargaining unit or bargains to impasse over the effects of increased subcontracting.

(b) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of

[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(c) Within 14 days after service by the Region, post copies of the attached Notice at its Sacramento, California facility set forth in the Appendix[14]. Copies of the notice, on forms provided by the Regional Director for Region 20, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after October 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The allegations of the complaint not sustained herein shall be and they hereby are dismissed.

Issued at San Francisco, California this 14th day of November 2003.

Clifford H. Anderson
Administrative Law Judge

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

An employer whose employees are represented by a union must bargain with the union concerning the unit employees' terms and conditions of employment. During that bargaining the employer must maintain existing conditions of work that existed prior to the commencement of its bargaining obligation. Further an employer is obligated to notify and bargain with a union that represents its employees about changes that will effect them if the employer is making changes that will have an effect on the bargaining unit.

Since we have historically subcontracted out our trash hauling work, we did not have an obligation to limit our subcontracting of trash hauling during bargaining, but we did have an obligation to notify and provide an opportunity to the Union to bargain about the effects on the bargaining unit of our changes in the level of subcontracting trash hauling. In November 2002 and thereafter, we changed the amount and degree of subcontracting of our trash hauling without notifying the Union of our intentions to change the amount of trash hauling we subcontract and our implementation of changes in the amount of subcontracting done.

The National Labor Relations Board, after a trial at which we appeared and presented evidence and argument, found that we wrongly changed our amount of unit trash hauling subcontracting without providing the Union an opportunity to bargain over the effects of those changes on the bargaining unit. The Board has ordered us to return to the levels of subcontracting we utilized during the period June 2002 through October 2002 and to limit our subcontracting to that level unless and until an agreement is reached with the Union respecting the effects of an increase in subcontracting or until an impasse in bargaining over effects occurs.

Accordingly, we give our employees the following assurances.

**WE WILL NOT** change our level of the subcontracting of trash hauling without first timely notifying and provide an opportunity to the Union to bargain about the effects of our changes in the level of subcontracting of unit work.

**WE WILL NOT** in any like or related manner violate the National Labor Relations Act.

**WE WILL** return the level of subcontracting done in the period of June through October 2002, which was the level in effect before our failure to notify the Union of our intention to change that level and our failure to provide an opportunity to the Union to bargain about the effects of our changes in the level of subcontracting of unit work.

**WE WILL** limit our subcontracting to the level of subcontracting done in the period of June through October 2002, unless and until an agreement is reached with the Union respecting the effects of an increase in subcontracting or until an impasse in bargaining over effects occurs.

The Chauffeurs, Teamsters and Helpers, Local Union No. 150, International Brotherhood of Teamsters, AFL-CIO represents our employees in the following bargaining unit:

> All full-time and regular part-time truck drivers employed by Respondent at its 849 Fruitridge Road, Sacramento, California facility; excluding foremen, office clerical employees, Class B yard driver, sorters, janitors, machine operators, weight masters, rakers, traffic controllers, laborers, maintenance employees, guards, and supervisors as defined in the Act.

**BLT ENTERPRISES OF SACRAMENTO, INC., d/b/a SACRAMENTO RECYCLING & TRANSFER STATION**

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE' COMPLIANCE OFFICER, (415) 356-5139.

**THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS**

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.